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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
*Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF FOR THE PETITIONER

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## BRIEF FOR THE PETITIONER

### OPINION BELOW

The opinion of the Court of Appeals (R. 126-35) is reported at 311 F. 2d 343.

### JURISDICTION

The judgment of the Court of Appeals was entered December 4, 1962 (R. 136). Certiorari was granted April 22, 1963 (R. 137). The jurisdiction of this Court rests on 8 U.S.C. § 1105a (1961 Supp.), 5 U.S.C. § 1040 and 28 U.S.C. § 1254 (1).

## QUESTION PRESENTED

Whether the provision of § 241 (a)(4) of the Immigration and Nationality Act of 1952 for deportation of an "alien . . . who at any time after entry is convicted of two crimes" applies to an individual who was a naturalized citizen when convicted.

## STATUTE INVOLVED

Section 241 (a)(4) and (b) of the Immigration and Nationality Act of 1952, 66 Stat. 204, as amended, 8 U.S.C. § 1251 (a)(4) and (b), provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> "(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * * *
>
> "(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty

days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."

## STATEMENT

Petitioner was born in Italy on January 6, 1891, and was brought to the United States at the age of four (R. 43). He has resided here for over sixty-eight years, his only absence from this country being a short visit to Mexico in 1948 (R. 43, 59). Petitioner is married to a United States citizen (R. 59). In 1925 he himself became a citizen of the United States by an order of naturalization issued by the United States District Court for the Southern District of New York (R. 43).

In 1954 petitioner was convicted of separate counts of attempting to defeat and evade income taxes for the years 1948 and 1949[1] (R. 48). His naturalization was cancelled by order of the United States District Court for the Southern District of New York on March 9, 1959 (R. 43), which order was subsequently affirmed by the Court of Appeals for the Second Cir-

[1] The prosecution was based on the net worth-expenditure theory (R. 99-101). The original conviction was on three counts, for the years 1947 through 1949. On appeal the conviction on the 1947 count was reversed and the other two affirmed. *United States* v. *Costello*, 221 F. 2d 668 (2d Cir. 1955), *affirmed*, 350 U.S. 359.

cuit[2] and, on February 20, 1961, by this Court.[3] The ground upon which the revocation of petitioner's citizenship was sustained was that, in giving his occupation as "real estate," he was guilty of a "willful misrepresentation", because his real occupation was bootlegging and he "only dabbled in real estate". *Costello* v. *United States*, 365 U.S. 265, 277.

After this Court affirmed petitioner's denaturalization, the Immigration and Naturalization Service of the Department of Justice instituted proceedings to deport him. On June 21, 1961, the Service's Special Inquiry Officer, after a hearing, ordered petitioner to be deported under the second part of § 241 (a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251 (a)(4),[4] as an "alien . . . who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . ." (R. 42-62). Petitioner's appeal from this order was dismissed by the Board of Immigration Appeals on January 2, 1962 (R. 65-90). Petitioner then sought review in the court below, which, on December 4, 1962, dismissed his petition for review, holding that § 241 (a)(4) applies to petitioner even though he was a citizen when convicted (R. 126-35).

## SUMMARY OF ARGUMENT

The court below held, with respect to the question here involved, that § 241 (a)(4) permits deportation of a person who is now an alien, even though, at the time of the convictions, he was a naturalized citizen. The government had supported the deportation upon

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[2] *United States* v. *Costello*, 275 F. 2d 355 (2d Cir. 1960).

[3] *Costello* v. *United States*, 365 U.S. 265.

[4] Hereinafter referred to as "§ 241 (a)(4)."

a second ground as well: that, by virtue of the relation-back of his denaturalization to the date of his naturalization, petitioner was actually an alien at the time of the convictions. The court below did not decide the validity of this second ground. The government, however, still presses it.[5] Petitioner will therefore argue both grounds.

Section 241 (a)(4), by its plain terms, authorizes deportation only of aliens who were aliens when they were convicted. It is, in this respect, significantly different from the statute involved in *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, which permitted deportation of an alien who had been a citizen when convicted; and it is significantly similar to the statute involved in *Mangaoang* v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876, which was held not to permit deportation of an alien who had been a national of the United States when the asserted ground of deportability occurred. By reading "is" to mean "has been" the court below has distorted the ordinary meaning of subparagraph (4) of § 241 (a); it has attributed to Congress an intent not expressed in that subparagraph and negated by the use of past-tense language in various other subparagraphs of § 241 (a); and it has ignored the legislative design that § 241 (a)(4) not be applicable to aliens who could not have availed themselves of the § 241 (b) provision for recommendation of non-deportation. *Gubbels* v. *Hoy*, 261 F. 2d 952 (9th Cir. 1958). The authorities relied on by the government to support its reading of § 241 (a)(4) are inapposite, because all of them, like *Eichenlaub*, involve statutes using past-tense language, unlike the present-tense language of § 241 (a)(4).

[5] See Brief in Opposition, pp. 4 and 6, n.

Even if § 241 (a)(4) cannot be read as clearly requiring convictions during alienage as a ground of deportability, it certainly cannot be read as clearly permitting deportation for convictions occurring during citizenship. To the extent that there is such an ambiguity, this Court's approach to deportation provisions would require resolution of the ambiguity in favor of petitioner. *Fong Haw Tan* v. *Phelan,* 333 U.S. 6.

If, as we submit, § 241 (a)(4) authorizes deportation only for convictions during alienage, the judgment below must be reversed. The government's contention, not relied on by the court below, that petitioner was actually an alien when convicted, because denaturalization relates back to the date of naturalization, is untenable. Although the relation-back the government relies on is that provided by § 340(a) of the Immigration and Nationality Act of 1952, the concept was not created by that statute. It was generally applied by the courts, prior to the 1952 Act and without statutory mandate, to affect derivative citizenship based on revoked naturalization. The government's efforts to apply the concept to affect deportation were rejected in *Mangaoang* v. *Boyd, supra,* and in *United States ex rel. Brancato* v. *Lehmann,* 239 F. 2d 663 (6th Cir. 1956). This Court, when the government pressed the point, did not decide it. *Eichenlaub, supra,* 338 U.S. at 529-30.

There is absolutely nothing in the denaturalization statute or the legislative history thereof to show an intent of Congress to affect deportability on a relation-back theory. Indeed, such evidence as there is in the denaturalization statute and its history shows that Congress intended to affect nothing but claims of

derivative citizenship. Moreover, if § 340(a) were construed as affecting deportability, there would be introduced into § 241 (a)(4) an ambiguity which, under the principle of *Fong Haw Tan, supra,* would be resolved against deportation. See *Mangaoang* v. *Boyd,* 205 F. 2d at 556.

## ARGUMENT

### I. SEC. 241 (a)(4) DOES NOT AUTHORIZE DEPORTATION OF AN ALIEN FOR CONVICTIONS OCCURRING WHILE HE WAS A NATURALIZED CITIZEN

Sec. 241 (a)(4) permits the Attorney General to deport an "*alien* . . . who at any time after entry *is* convicted of two crimes" of a specified type.[6] The convictions relied on to support the instant deportation order occurred almost thirty years after petitioner's naturalization as a United States citizen and about five years before his citizenship was revoked. Petitioner claims, therefore, that he is non-deportable under the plain language of the statute—"alien . . . who is convicted . . .," since that language permits deportation only of one who was an alien at the time of the convictions.

The government's contrary contention and the holding below are based on two assertions:

> (a) That by using the word "is" Congress used "the most comprehensive word that could have been used" (R. 129), so that "is" should be read to include "has been" and, therefore, to embrace one who is now an alien if, at any time after his original entry, he has been convicted.

[6] Emphasis supplied.

(b) That *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, "strongly supports the Government view" (R. 129).

Because of the heavy reliance upon *Eichenlaub* both by the government and by the court below, we shall address our argument first to the effect of that decision upon the case at bar. Then we shall show that the interpretation of § 241 (a)(4) advanced by the government and accepted below is erroneous.

**A. Eichenlaub Does Not Support the Order Here Under Review**

The statute involved in *Eichenlaub* was § 1 of the Act of May 10, 1920, 41 Stat. 593, ch. 174, which authorized deportation of "aliens who since August 1, 1914, have been or may hereafter be convicted of" certain specified crimes. The question before the Court was whether an individual who had been a naturalized citizen when convicted and was subsequently denaturalized for fraud could thereafter be deported under that statute. The Court held by a majority of four to three that he could.

The dissent,[7] relying on the long line of authority calling for narrow interpretation of provisions for deportation,[8] was of the view that the Court should not "squeeze the Act of May 10, 1920, . . . so as to yield every possible hardship of which its words are susceptible." 338 U.S. at 533. Mr. Justice Frankfurter wrote:

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[7] By Justice Frankfurter, concurred in by Justices Black and Jackson.

[8] See cases cited, 338 U.S. at 533.

> "I am aware of the fact that we are dealing here with a person whose citizenship has been taken from him. I maintain, however, that the rigorous statute permitting deportation of an 'alien' should be read to apply only to one who was an alien when convicted and should not be made to apply to persons in the position of these petitioners." 338 U.S. at 534.

The Court's majority of four, however, found that deportation was authorized by "the ordinary meaning of" the language employed by Congress. 338 U.S. at 527. The language to which the majority referred, as shown by the emphasis given it in the opinion, was the tense of the verb employed by Congress. The Court said:

> "The statutory language which says that 'aliens who since August 1, 1914, *have been or may hereafter be convicted . . .*,' (emphasis supplied)[*] refers to the requirement that the deportations be applicable to all persons who had been convicted of certain enumerated offenses since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920." 338 U.S. at 530.

In other words, the majority read, from the emphasized language, an unambiguous intent of Congress that one who was an alien at the time of the deportation order and who, since August 1, 1914, had been convicted of one of the specified crimes should be deportable, even though he had been a naturalized citizen at the time of the conviction. The Court's holding is thus limited to the language of the statute before it

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[*] By the Court.

and does not purport to govern statutes providing for deportation of "aliens who *are* members of . . . the Communist Party," *Mangaoang* v. *Boyd*, 205 F. 2d 553, 555 (9th Cir. 1953), *cert. denied*, 346 U.S. 876; or an "alien who . . . *is* sentenced to imprisonment . . . ." *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666-67 (6th Cir. 1956).[10]

The conclusion below that *Eichenlaub* "strongly supports" a construction of § 241 (a)(4)—"alien . . . who . . . is convicted"—to permit deportation of one who was a citizen when convicted is, therefore, unfounded. In reaching that conclusion, moreover, the court below ignored the danger signals raised in the *Eichenlaub* dissent. Certainly it cannot be said of this statute, as the *Eichenlaub* majority said of the statute there involved, that Congress had expressed a clear intent to lump all denaturalized persons together and deport them for convictions occurring while they were citizens. Mr. Justice Frankfurter, finding no such clear intent in the *Eichenlaub* statute, went on to say:

> "If and when the Congress gives the matter thought it may well draw distinctions between one who was an alien and one who was naturalized at the time of conviction, based on the manner in

[10] In *Brancato*, the court said:

> "The ruling ordering deportation in United States ex rel. Eichenlaub v. Shaughnessy, supra, was based upon the statute of May 10, 1920, 8 U.S.C.A. § 157, which was a special statute dealing with sabotage and espionage during the first World War and applicable to some 650 aliens then in custody. We do not believe that the construction given to the different wording of that statute is applicable to the general deportation statute which we are now considering." 239 F. 2d at 666-67.

which citizenship was lost,[11] the type of offense committed,[12] and the lapse of time between conviction and denaturalization.[13] These serious differentiations should not be disregarded by giving a ruthlessly undiscriminating construction to the statute before us not required by what Congress has written." 338 U.S. at 536-37.

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[11] The "fraud" in procurement of naturalization which justifies revocation of citizenship may be of varying degrees of blatancy. Although petitioner's denaturalization was affirmed by this Court, the dissenting opinion said:

> "Petitioner answered truthfully when he listed 'real estate' as his 'occupation.' He did not answer truthfully if the answer is taken to embrace all his sources of income. But, as I said, the form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government." 365 U.S. at 289.

We do not suggest that the Court was wrong in affirming petitioner's denaturalization. We suggest only that there was room for Congress to distinguish between him and other improperly naturalized persons for deportation purposes.

[12] Without detracting from the gravity of the offense of attempting to evade income taxes, we suggest that Congress, if faced with the problem, could well distinguish, for deportation purposes, between convictions for that offense and for others. See *United States* v. *Carrollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939):

> "We are not prepared to rule that an attempt to evade the payment of a tax due the nation, or the commonwealth, or the city, or the school district, wrong as it is, unlawful as it is, immoral as it is, is an act evidencing baseness, vileness, or depravity of moral character. The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion. Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is to misuse words."

[13] Another basis of distinction which Congress might adopt is the lapse of time between naturalization and conviction, in the instant case almost thirty years.

Such distinctions, said Mr. Justice Frankfurter, "are not within the power of this Court to draw." 338 U.S. at 536.

The court below, by holding that in the word "is" Congress had used "the most comprehensive word that could have been used," has attributed to Congress an intent that there shall be no distinctions. We come, therefore, to the question whether Congress has used the word "is" to include "has been."

**B. Congress Expressed No Intent in § 241 (a)(4) to Authorize Deportation of Denaturalized Persons for Convictions Occurring During Citizenship**

The "ordinary meaning" of the language of the *Eichenlaub* statute—"aliens who . . . *have been* . . . convicted"—was held by a four-to-three vote of the Court to include a person who was a naturalized citizen when convicted but an alien when sought to be deported. 338 U.S. at 527, 530. It would seem to be self-evident that the ordinary meaning of § 241 (a)(4)—"alien . . . who . . . *is* convicted"—would not include such a person. The statute seems plainly to require the person to be deported to have been an alien at the time of the convictions in question. The government and the court below, however, read § 241(a)(4) as if it said "alien . . . who . . . *has been* convicted."

In support of its construction of the statute's present-tense language as if it were past-tense language, the government has relied upon the following authorities (R. 70-81 *passim*):

*Eichenlaub, supra;*
*Resurreccion-Talavera* v. *Barber,* 231 F. 2d 524 (9th Cir. 1956);

*Application of Marks*, 198 F. Supp. 40 (S.D.N.Y. 1961);[14]
*Matter of M —*, A-11875663, Int. Dec. 1169 (Board of Immigration Appeals, July 16, 1961);
*Matter of W —*, 5 I.&N. Dec. 759 (Board of Immigration Appeals, 1954);
*Matter of S —*, 5 I.&N. Dec. 678 (Board of Immigration Appeals, 1954);
*Matter of P —*, 4 I.&N. Dec. 373 (Board of Immigration Appeals, 1951).

In relying upon those decisions, the government has ignored the fact that they all involved statutes framed *in the past tense*. The statute in *Eichenlaub*, as already noted, covered "aliens who . . . *have been* . . . convicted . . . ." The *Resurreccion-Talavera* statute applied to "any alien who *was* convicted prior to entry . . . ." 231 F. 2d at 525. The other four decisions involved the exclusion statute, § 212 (a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (a)(9), or earlier counterparts thereof, covering "aliens who *have been* convicted . . . ."

The significant distinction between present-tense and past-tense language is exemplified by *Mangaoang* v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876. The statute in that case[15] authorized deportation of "aliens who are members of . . . the Communist Party . . . ." The court held it inapplicable to an alien who had been a member of the Communist Party while he was a "national" of the United States but had abandoned that membership before losing his

[14] But see, *contra*, *Marks* v. *Esperdy*, 203 F. Supp. 389, 397 (S.D.N.Y. 1962), *reversed on other grounds*, 315 F. 2d 673 (2d Cir. 1963).

[15] Internal Security Act of 1950, § 22, 64 Stat. 1006.

nationality. There, as here, the government relied on *Eichenlaub*, but the court, distinguishing *Eichenlaub* on the statutory language, said:

> "We think that the language here under consideration, namely, 'Aliens who *are* members of . . . the Communist Party', (emphasis ours) was intended to refer to persons who are at the same time both aliens and members of the Communist Party. We think it was not sufficient to prove that the appellant was an alien at the time of his arrest and that he was a member of the Communist Party at some prior date on which he was not shown to have been an alien." 205 F. 2d at 555.

The court which decided *Mangaoang* later reemphasized the distinction between present-tense and past-tense statutes in *Resurreccion-Talavera* v. *Barber*, 231 F. 2d 524 (9th Cir. 1956). The statute in that case was framed in the past tense: "any alien who was convicted, . . . prior to entry, of a felony . . . involving moral turpitude . . . ." 231 F. 2d at 525. Talavera, like Mangaoang, was a former national of the United States who had lost his nationality upon the proclamation of Philippine independence in 1946. While an American national, in 1942, he had been convicted of burglary. In sustaining Talavera's deportation, over his claim that the *Mangaoang* decision precluded it, the Court said:

> "The fact that Talavera was a national of the United States and not an alien at the time of his conviction of the crime involving moral turpitude is irrelevant. The case of Mangaoang v. Boyd, supra, relied upon by appellant, is clearly distinguishable. Mangaoang was ordered deported under the provisions of the Internal Security Act of 1950, which authorized deportation of '. . . (C)

> Aliens who *are* members of . . . the Communist Party of the United States.' § 22, U.S. Code Cong. Service 1950, p. 1001.. (Emphasis added.)'"[16] 231 F. 2d at 525.

The basis of the decision is unmistakable. Talavera was deportable for a conviction occurring before he became an alien, because the applicable statute said "alien who *was* convicted" and was clearly intended to cover the pre-entry past, no matter how distant. In distinguishing the case from its earlier decision in *Mangaoang,* the court dispelled all doubt that, when the statute frames the ground of deportability in present-tense language—e.g., in *Mangaoang,* "aliens who are members," and, in the instant case, "alien . . . who . . . is convicted"—there must be a coincidence between the ground of deportability and the status of alienage.

This distinction between past-tense and present-tense language which the Ninth Circuit drew in *Talavera* was drawn by the Board of Immigration Appeals itself in *Matter of S —,* 5 I.&N. Dec. 678 (1954), in holding excludable an alien who, while he was a citizen, had committed a crime involving moral turpitude. Like Talavera, the alien had relied on *Mangaoang.* Since the exclusion statute, § 212 (a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (a)(9), covers "aliens who *have been* convicted," the Board, relying on the "ordinary meaning" of the language, held, just as did the court in *Talavera,* that the

[16] Despite the fact that the court thus emphasized the present tense of the verb in the *Mangaoang* statute in distinguishing the case before it from *Mangaoang,* the government here maintains that "there is nothing in *Talavera* . . . to indicate that the tense affected the . . . decision" (R. 74).

conviction need not have coincided with the status of alienage, but could have occured at any prior time. In distinguishing the case before it from *Mangaoang* the Board referred specifically to that portion of the *Mangaoang* opinion which emphasized the statute's use of the present tense, "aliens who *are* members . . . ." 5 I.&N. Dec. at 680, n. 2.

It would seem, therefore, that if § 241 (a)(4) is read in accordance with the "ordinary meaning" of its words, as the Board read the exclusion statute and as this Court read the *Eichenlaub* statute, it clearly requires convictions during alienage as a ground of deportation. At the very least, we submit, the statute cannot be read as a clear expression of intent to deport petitioner for convictions which occurred while he was a citizen. If the most that can be said for the government's position is that there is an ambiguity in § 241 (a)(4)—and we submit that is the most that can be said for it—there comes into play the well-established principle that, where two constructions of a deportation statute are possible, the one favorable to the alien must be adopted. This Court said in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388 . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

The beneficent effect of the *Fong Haw Tan* principle[17] was eliminated by the court below by the simple expedient of declaring, in utter disregard of the foregoing pertinent authorities and of the internal evidence of the statute itself, that "there is no room for interpretation or construction" (R. 129). "In the context of the statute," said the court, "the word 'is' appears to us to be the most comprehensive word that could have been used, just as is the case with the phrase 'at any time after entry'" (R. 129).

In thus reading "is" to include "has been," the court below ignored the fact that in other subparagraphs of the very same subsection of the 1952 Act, Congress, when it meant post-entry conduct, no matter when occurring, to be a ground of deportability, did not use the so-called "comprehensive" word "is", but rather spelled out its meaning in specific past-tense language. Section 241 (a), 8 U.S.C. § 1251(a), authorizes the deportation of any alien who:

> "(7) is engaged, or at any time after entry *has engaged*" in certain conduct;

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[17] See also *Bonetti* v. *Rogers*, 356 U.S. 691, 699; *Barber* v. *Gonzales*, 347 U.S. 637, 642-43; *Gubbels* v. *Hoy*, 261 F. 2d 952, 956 (9th Cir. 1958); *Holzapfel* v. *Wyrsch*, 259 F. 2d 890, 893 (3d Cir. 1958); *Ablett* v. *Brownell*, 240 F. 2d 625, 628 (D.C. Cir. 1957); *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666 (6th Cir. 1956); *United States ex rel. Alcantra* v. *Boyd*, 222 F. 2d 445, 447 (9th Cir. 1955); *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 759, 765 (8th Cir. 1954); *United States ex rel. Giglio* v. *Neelly*, 208 F. 2d 337, 341 (7th Cir. 1953); *Mangaoang* v. *Boyd*, 205 F. 2d 553, 556 (9th Cir. 1953), *cert. denied*, 346 U.S. 876; *Mirabal-Balon* v. *Esperdy*, 188 F. Supp. 317, 319 (S.D.N.Y. 1960); *Tutrone* v. *Shaughnessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958); *Jeronimo* v. *Murff*, 157 F. Supp. 808, 815 (S.D.N.Y. 1957).

"(11) is, or hereafter at any time after entry *has been,* a narcotic drug addict, or who at any time *has been* convicted of a" narcotics violation;

"(12) is or at any time after entry *has been* connected with the management, of a house of prostitution or any other immoral place";

"(15) at any time within five years after entry, shall *have been* convicted of violating the provisions of title I of the Alien Registration Act. 1940";

"(16) at any time after entry, shall *have been* convicted more than once of violating the provisions of title I of the Alien Registration Act. 1940."

Simple logic and normal principles of construction suggest that Congress meant what it said in each provision and that subparagraph (4), lacking the past-tense language which was included in the other cited subparagraphs, was intended to apply only to one convicted during alienage.

The court below, taking a phrase out of context from *Lehmann* v. *United States ex rel. Carson,* 353 U.S. 685, 689, suggests (R. 129) that this Court has read "is" to mean "has been" in § 241 (a)(4). In *Carson* the alien sought to be deported had *at all times* been an alien. There was no issue relating to concurrence *vel non* of alienage and convictions. The issue before the Court was whether a twice-convicted alien who was non-deportable under the pre-1952 deportation statute became deportable when § 241 (a)(4) was enacted in 1952. The Court held that the alien did become deportable in 1952. Nothing in the opinion suggested that he would be deportable if he had not been an alien at the time of his convictions. All that the Court said

in the language relied on below is that one who, before 1952, has fulfilled the conditions of deportability prescribed by the 1952 Act may be deported. Those conditions, we have shown (and nothing in *Carson* is to the contrary), are the concurrence of alienage and convictions. In using the past-tense form "has been convicted", the Court only meant, as is clear from the context, that the 1952 deportation provision could apply even though the conditions of deportability occurred before 1952.

Nor does the phrase "at any time after entry", so heavily relied on by the court below, magically give a present-tense verb past-tense effect. The court seemed to think that the quoted phrase makes it clear and unequivocal that an alien is deportable for post-entry convictions, whether or not he was an alien at the time of the convictions (R. 129-30). In attributing to the phrase force enough to make "is" mean "has been", the court has again ignored the various other subparagraphs of § 241(a), in which, although using the phrase "at any time after entry", Congress found it necessary to use both a present-tense and a past-tense verb. See pp. 17-18 *supra*. For example, if "alien . . . who at any time after entry is convicted" [§ 241 (a)(4)] applies to one who was not an alien when convicted, why was it necessary for Congress, in basing deportability on drug addiction, to say "alien . . . who . . . is, or hereafter *at any time after entry has been*, a narcotic drug addict . . . ." [§ 241 (a)(11)]?

We submit that the phrase "at any time after entry" has a much more obvious purpose and effect than that attributed to it below. Section 212 (a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1182 (a)(9), provides for the exclusion of aliens who

have been convicted of a crime involving moral turpitude. Any alien thus excludable who nevertheless enters the United States is made deportable by § 241 (a)(1), 8 U.S.C. § 1251 (a)(1). The purpose of § 241 (a)(4) is to authorize deportation of aliens who were not excludable but who are convicted after entry. If the "after entry" phrase were omitted from § 241 (a)(4), that subparagraph would largely duplicate § 241 (a)(1). The phrase has no other significance than to make deportable those aliens whose convictions occur after their entry into the United States. There is nothing in the phrase to make the statute applicable to persons convicted as citizens but later becoming aliens.

By any fair reading of § 241 (a)(4), therefore, Congress cannot be held to have intended to cover pre-alienage convictions. At the very least the subsection is ambiguous in that respect and, under the *Fong Haw Tan* principle, must be construed in favor of petitioner. The legislative scheme of § 241 as a whole, as we shall next show, provides further basis for construing the subsection as not covering pre-alienage convictions or for resolving ambiguity in favor of the alien if the subsection be found ambiguous.

**C. Subsection (b) of § 241, Read Together With Subsection (a)(4), Shows That Congress Did Not Intend to Authorize Deportation of Denaturalized Persons for Convictions Occurring During Citizenship**

While subsection (a)(4) provides for deportation of aliens convicted of crimes, subsection (b), 8 U.S.C. § 1251 (b), provides that "subsection (a)(4) . . . respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court sentencing such alien for such crime shall make, at the

time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported . . . ." In *Gubbels* v. *Hoy*, 261 F. 2d 952, 954 (9th Cir., 1958), in setting aside an order deporting an alien under § 241 (a)(4) on account of two convictions by courts martial, the court said:

> "It seems plain that the qualifying provisions of subsection (b) are an important part of the legislative scheme expressed in subsection (a)(4). While that section makes a conviction there referred to ground for deportation, it is qualified in an important manner by the provision of subsection (b)(2) that if the court sentencing the alien makes the recommendation mentioned, then the provisions of subsection (a)(4) do not apply. This extends to the alien an important right or privilege. No doubt in most cases counsel for a convicted alien would by motion call this provision to the attention of the court where the judgment was imposed. It also seems plain that if a military court is so constituted or its procedures are such as to make this privilege extended by subsection (b)(2) not readily available to a convicted alien, then it would be a fair conclusion that convictions in a military court were not contemplated by subsection (a)(4)."

*Gubbels* has thus held that § 241 (a)(4) must be read in the light of § 241 (b) and must, therefore, be construed not to apply to any alien who cannot have had the privilege given by subsection (b) of seeking a recommendation of non-deportation. The court below rejected petitioner's contention that, under *Gubbels*, § 241 (a)(4) must be construed as inapplicable to him because, as a citizen at the time of his convictions, he could not have availed himself of the procedure which

subsection (b) extends only to aliens (R. 131-32). This rejection was based on the grounds that: (1) petitioner waived his subsection (b) rights "as he had secured his naturalization by fraud"; (2) petitioner was chargeable with knowledge of his vulnerable citizenship and, therefore, could have sought the subsection (b) recommendation when he was convicted, even though not yet denaturalized; and (3) the right given in subsection (b) is not an "inherent right", and can, therefore, be withheld by Congress. All three of these grounds, we submit, are untenable.

The "waiver" ground (R. 131) ignores the real point in *Gubbels*. Subsection (b) is not merely the grant of a privilege. It is also a qualification of the deportation authority conferred by subsection (a)(4). What *Gubbels* says is that, where the subsection (b) privilege is "not readily available," the case is not within subsection (a)(4)'s grant of authority to deport. In short, Congress did not intend to authorize deportation of a denaturalized alien for convictions occurring while he was a naturalized citizen who, as such, could not have invoked the recommendation procedure which is an intrinsic part of the legislative scheme.

The statement below that petitioner could have invoked the subsection (b) procedure (R. 131-32) ignores the fact that petitioner was not an alien at the time of his sentencing. Subsection (b), as noted, provides that the court sentencing "such alien" may recommend that "such alien" not be deported. Granting petitioner's fraudulent procurement of citizenship, he had no legal right to treat his naturalization as a nullity in order to invoke a procedure provided by law only

to aliens. See *United States* v. *Stephan*, 50 F. Supp. 445, 448 (E.D. Mich. 1943):

> "It is self-evident that fraud in procuring the order of naturalization, although a ground for its cancellation, does not render it void but only voidable; and that until such time as his citizenship is revoked, such fraud does not lessen his obligations and duties to this country or relieve him of the solemn undertakings he made in his oath of allegiance."

In first ordering petitioner's deportation, the Immigration and Naturalization Service, commenting on the *Stephan* case, said (R. 57):

> "All this case holds is that unless and until the individual is denaturalized by a court, he is still recognized as a citizen for all purposes. The Government had its choice of prosecuting for treason or bringing an action to denaturalize. It chose the former. Stephan was not in a position to declare himself denaturalized for fraud,—only a competent court could do so."

The statement that petitioner could have invoked the subsection (b) procedure, therefore, has no basis in law. Moreover, even if he *could* have declared himself to be an alien, five years before his denaturalization, the suggestion that he *should* have done so amounts to saying that one whose citizenship is subject to challenge may be penalized for defending it. Until this Court affirmed his denaturalization, petitioner had every right to maintain that his citizenship had not been obtained improperly, a position taken also by the dissenting members of this Court. *Costello* v. *United States*, 365 U.S. at 288-89.

There is a very simple answer to the third ground relied on below for rejecting petitioner's contention under *Gubbels*. It is undeniable that an alien has no "inherent right" to remain in the United States and that, correlatively, Congress has power to legislate toward his removal. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724. But only by such legislation is his right impaired and, indeed, by virtue of the principle of *Fong Haw Tan*, only if that legislation clearly and unambiguously applies to him. As Judge Learned Hand said in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490 (2d Cir. 1950):

> "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate."

By imposing subsection (b) as a limitation on subsection (a)(4)'s grant of authority to deport, "Congress recognized that not every conviction of a crime involving moral turpitude within the legal definition of that term required deportation but that there might well be mitigating circumstances under which the harsh penalty of deportation should not be imposed." *Tutrone* v. *Shaughnessy*, 160 F. Supp. 433, 437 (S.D. N.Y. 1958).[18] Petitioner's contention that Congress

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[18] Cf. the language of Mr. Justice Frankfurter in the *Eichenlaub* dissent, quoted *supra* pp. 10-11. As pointed out below, Congress was aware of what was said in *Eichenlaub* when it enacted the 1952 Act (R. 131). It may well be that the imposition of § 241 (b) as a limitation on subsection (a)(4)'s grant of authority to deport was Congress' answer to the problem posed by the *Eichlenlaub* dissent.

expressed no intent in § 241 (a)(4) and (b) to authorize his deportation is, therefore, not disposed of by the declaration below that Congress has the power to do so.

It is submitted that there is no basis, either in law or reason, for sustaining the determination that § 241 (a)(4) authorizes deportation of petitioner as a present alien convicted of two crimes while he was a naturalized citizen. If we are correct in this submission, the validity of the deportation order must depend on the government's secondary contention—that, for the purpose of § 241 (a)(4)'s application, petitioner was an alien when convicted.

## II. PETITIONER'S DENATURALIZATION DID NOT RELATE BACK TO THE DATE OF HIS NATURALIZATION TO MAKE HIM DEPORTABLE UNDER § 241(a)(4) AS ONE WHO WAS AN ALIEN AT THE TIME OF HIS CONVICTIONS.

Respondent has ruled, as an alternative basis for supporting the deportation order, that petitioner was an alien at the time of his convictions, by virtue of the relation back of his denaturalization to the date of his naturalization (R. 54-58, 87-89). The court below did not rely upon this alternative ground of deportation, but respondent continues to press it in this Court. See Brief in Opposition, pp. 4 and 6, n.

The basis of this asserted alternative is an importation into the deportation statute of the provision of § 340 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451 (a), under which petitioner was denaturalized in 1959, that the order of denaturalization "shall be effective as of the original date of" the naturalization order. To prevail on this point the government must show that Congress intended, by in-

cluding this language in the denaturalization provision, to lay a ground for deporting under § 241 (a)(4) an individual whose convictions occurred prior to denaturalization.

The statutes prior to 1952, although providing for denaturalization, contained no language making denaturalization effective as of the date of naturalization. Such "relation-back" language appeared for the first time in § 340 (a) of the 1952 Act. Yet, despite the absence of such language in the earlier statutes, it was generally held that a denaturalization for fraud made a nullity of the naturalization, *Johannessen* v. *United States*, 225 U.S. 227; *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 665, 666 (6th Cir. 1956); *Battaglino* v. *Marshall*, 172 F. 2d 979, 981 (2d Cir. 1949); *Rosenberg* v. *United States*, 60 F. 2d 475 (3d Cir. 1932), *cert. denied*, 287 U.S. 645; and that, for the purpose of determining rights of derivative citizenship, denaturalization related back to the date of naturalization. *Brancato, Battaglino and Rosenberg, supra.*

There was no suggestion, however, in any of the authorities that such relation back applied for the purpose of *deportation*. In *Rosenberg*, the court was careful to point out:

> "The question of the right of the government to deport is not here involved." 60 F. 2d at 476.

In *Brancato* where the government made the very same argument here advanced, so that the right of the government to deport was involved, the court refused to hold that the individual's denaturalization in 1939 related back to 1929, when he was naturalized, so as to make him an alien at the time of his 1930 "entry"

and thus deportable under the first clause of § 241 (a) (4). The court said:

> "The Government's contention would require that we give the statute a relation-back construction. We have no difficulty in giving a retroactive effect to the *denaturalization order* in view of the authorities supporting such a ruling. But the Government has cited us no case from the Supreme Court or the U.S. Courts of Appeals which has gone the additional step and given such relation-back construction to the *deportation statute*. It was urged upon the Supreme Court in United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521, 529, 70 S. Ct. 329, 94 L. Ed. 307, where the Court found that a ruling on the question was unnecessary for a disposition of the case. We think that the Court's later ruling in Barber v. Gonzales, supra, 347 U.S. 637, 642, 74 S. Ct. 822, 98 L. Ed. 1009, indicates disapproval of a relation-back construction." 239 F. 2d at 666. (Emphasis supplied.)

*Brancato* involved the first clause of § 241 (a)(4) ("... alien ... who is convicted of a crime ... committed within five years after entry ...."), while the case at bar involved the second clause ("... alien ... who at any time after entry is convicted of two crimes ...."). But this dissimilarity does not, as the government contends,[19] impair *Brancato's* force here. What *Brancato* said of the inapplicability of the relation-back doctrine for deportation purposes was not directed to any particular ground of deportation but to "the deportation statute" generally.

An argument similar to the one it urges here was urged by the goverenment in *Mangaoang* v. *Boyd*, 205

[19] Brief in Opposition, p. 4, n. 1.

F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876. The Philippine Independence Act of 1934, § 8(a)(1), 48 Stat. 462, provided that "for the purposes of . . . laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States *shall be considered as if they were aliens* . . . ." (Emphasis supplied.) The government argued, therefore, that, for the purpose of the deportation provision of the Internal Security Act, Mangaoang should be considered as if he were an alien during the time that he was a member of the Communist Party. The court, in disposing of the government's contention, noted that the 1934 Act did not make Mangaoang an alien in 1938, but provided only that he was so to be considered for limited purposes. If he were to be deported, the court noted, it would have to be by virtue of the Internal Security Act of 1950. The court said:

> "The question is whether the word 'aliens' in subdivision (C)—'Aliens who are members of . . . the Communist Party', includes not only aliens in the ordinary sense but was intended to be broad enough to include persons who were in reality nationals of the United States but who under the provisions of the Act of March 24, 1934 were to be 'considered as if they were aliens'.
>
> "If it be conceded that the word 'aliens' in the present Act [Internal Security Act of 1950] might possibly be given so broad a construction, *the most that could be said is that this possibility suggests an ambiguity.* There is nothing to show that when Congress enacted the Internal Security Act, it had in mind the very special case of the Filipinos described in the quoted section of the Act of March 24, 1934. Clearly we deal here with an Act which, if it were

to apply to this appellant, would have a punitive impact. * * *

"We think that the rule of strict construction should be applied to a statute having this impact, and that subdivision (C) above quoted must be construed to use the word 'aliens' in the ordinary sense and connotation, and not to include Filipinos who were for certain limited purposes to be 'considered as . . . aliens', under a section of a law long since obsolete and inoperative. We think therefore that the Act here in question did not authorize the appellant's deportation." 205 F. 2d at 556. (Emphasis supplied.)

The court held, in short, that, though persons like Mangaoang were to be "considered as if they were aliens" for various purposes, they could not be so considered for deportation purposes.

If the relation-back doctrine were here imported into the deportation statute, "the most that could be said," just as in *Mangaoang*, "is that this possibility suggests an ambiguity." The resulting ambiguity would have to be resolved here, just as it was in *Mangaoang*, in favor of the alien and against deportability. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. And, again as in *Mangaoang*, "there is nothing to show that when Congress enacted [§ 241 (a)(4)], it had in mind the very special case of" an individual convicted long after naturalization and before denaturalization.[20]

[20] The references to § 241 (a)(4) in the congressional committee reports never consider such a case or situation. See H. Rep. No. 1365, 82d Cong., 2d Sess. 60 (1952); S. Rep. No. 1515, 81st Cong., 2d Sess. 390-92 (1950); S. Rep. No. 1137, 82d Cong., 2d Sess. 21 (1952); H. Rep. No. 2096 (Conference Report), 82nd Cong., 2d Sess. 127 (1952). Nor do the section-by-section analyses of the bill prepared by the Immigration and Naturalization Service. See

Indeed, the scheme of the deportation statute suggests the contrary, for an importation into § 241 (a) (4) of the relation-back concept of the denaturalization statute would deny effect to § 241 (b), which *Gubbels, supra,* has held to be an essential part of the legislative scheme. See pp. 20-25 *supra.* All persons treated as aliens for deportation purposes by application of the relation-back theory would automatically have been deprived of their opportunity to seek a recommendation against deportation. The intent of Congress that not all crimes involving moral turpitude should result in deportation, *Tutrone* v. *Shaughnessy,* 160 F. Supp. 433, 437 (S.D.N.Y. 1958), would thus be thwarted.

In the case at bar, indeed, there is less support for deportability than there was in *Mangaoang.* In the latter case, the provision of the Philippine Independence Act of 1934 which the government sought to import into the deportation statute applied in terms to "expulsion of aliens." Here, however, there is nothing to show that Congress intended the relation-back concept of § 340 (a) to apply for deportation purposes.

The internal evidence of § 340 itself indicates that the relation-back concept of denaturalization was intended to affect no more than derivative citizenship. See subsections (e) and (f) of § 340. Subsection (h),

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*Analysis of S. 3455, 81st Cong., 2d Sess. (1950),* at pp. 241-3 through 241-6 (contained in vol. 5 of the Supreme Court Library compilation of legislative history of the Immigration and Nationality Act of 1952); and *Analysis of S. 716, 82d Cong., 1st Sess. (1951),* at pp. 241-2 through 241-4 (contained in vol. 4 of the said compilation). And see, generally, Besterman, *Commentary on the Immigration and Nationality Act,* 8 U.S.C.A., Part I, pp. 1-91 *passim* and legislative materials cited at pp. 2-4.

providing for the surrender and physical concellation of revoked certificates of naturalization, indicates that, apart from the effect upon derivative citizenship, Congress was concerned not with *ab initio* invalidity of revoked citizenship, but only with assuring that no future use be made of the revoked certificate.

The legislative history as well, albeit only by negative implication, suggests that it was only derivative citizenship which Congress intended to affect by the relation-back language. As we have shown, prior to the inclusion of the relation-back language in the statute, denaturalization was held to relate back in connection with claims of derivative citizenship. That Congress understood citizenship claims to be the area of application of the relation-back concept appears from S. Rep. No. 1515, 81st Cong., 2d Sess. 765 (1950). The subsequent committee reports, written in connection with the revised bills which contained the relation-back language and which ultimately became the 1952 Act, though treating the subject of "Judicial Revocation of Naturalization," say absolutely nothing about the effect of such revocation. See H. Rep. No. 1365, 82d Cong., 2d Sess. 82-83 (1952); and S. Rep. No. 1137, 82d Cong., 2d Sess. 45 (1952). It is unthinkable that, without saying a single word about it in a most copious legislative history, Congress could have intended the inclusion of the relation-back language to accomplish anything more than an adoption of the prevailing rule[21] that denaturalization relates back to defeat derivative citizenship. Absent an expression of

[21] The relation-back of denaturalization to defeat derivative citizenship, while the prevalent rule (see p. 26 *supra*), was not universally accepted. See *In re Bolter*, 66 F. Supp. 566 (S.D. Cal. 1946); *In re Findan*, 4 F. Supp. 189 (D.R.I. 1933).

intent, there would be as little reason to assume that Congress wished to affect the deportation grounds of § 241 (a)(4) as that it intended to create *ab initio* alienage for all other purposes. Considering the myriad situations in which a legal status, title or relationship is determined by citizenship and the wide variety of actual or potential state legislation on the subject (see 2 Am. Jur., *Aliens*, §§ 1-64 *passim*), it cannot seriously be thought that Congress intended, without saying so, to open a Pandora's box by creating retroactive alienage.

The function of § 241 (a)(4), as this Court said of the equivalent deportation provision of § 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 874, 889, as amended, "is to apprise aliens of the consequences which follow after conviction . . . of the requisite two crimes." *Jordan* v. *DeGeorge*, 341 U.S. 223, 230. And, though not a criminal statute, a deportation statute should be tested in the light of the "void for vagueness" doctrine. *Id.* at 230-231. As was said in *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 656-657 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449, in striking down on due process grounds a deportation order based on a conclusion that homosexual conduct is included within "psychopathic personality" as used in § 212 (a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (a)(4):

> "In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. [Citations omitted.] Or, as [otherwise] stated . . ., would persons of 'ordinary intelligence' be able to know what the statute means."

Surely petitioner cannot be said to have been on notice, when he filed the tax returns upon which he was convicted, that his 1925 naturalization was a nullity. Indeed, two of the eight Justices of this Court who ruled on his denaturalization were of the opinion that he held valid citizenship. *Costello* v. *United States*, 365 U.S. 265, 288. Section 241 (a)(4) certainly does not apprise an individual who, for a quarter of a century, has been enjoying the rights and privileges of citizenship that, if he should be convicted of two crimes of a certain type, he would be subject to deportation. To inject that consequence into the deportation statute by reading into it the relation-back concept of the denaturalization statute needlessly imperils the former statute by introducing an element of vagueness which Congress did not place in it.

The relation-back rule which respondent here urges goes beyond the position respondent itself has taken administratively in other cases. The Board of Immigration Appeals, while utilizing the relation-back concept from time to time, appears never to have sought to apply it to make a deportation sanction retroactive under a statute written *in praesenti*.[22] Thus the Board applied it in *Matter of P* —, 4 I.&N. Dec. 373 (1951), in sustaining a deportation under the counterpart of the present § 212 (a)(9), which covers "aliens who *have been convicted*" prior to entry. A similar application

[22] So long as the Board was dealing with statutes framed in the past tense, the invocation of the relation-back doctrine was of relatively little materiality, for the statutes themselves were held to apply to present aliens who had pre-alienage convictions, quite apart from any relation-back doctrine. See *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521; *Resurreccion-Talavera* v. *Barber*, 231 F. 2d 524 (9th Cir. 1956).

of the concept was made in *Matter of W —*, 5 I.&N. Dec. 759 (1954).

To use the relation-back concept to make § 241 (a) (4) retroactive would seem inconsistent with the Board's own basic distaste for the concept. In *Matter of C —*, 3 I.&N. Dec. 275 (1948, approved by Attorney General 1950), the Board said, in reversing the deportation of an alien based on an entry without a visa while he was a naturalized citizen:

> "When respondent left the United States in August 1930 to visit in Europe and when he returned in June 1931, he was, both from a legal and from a factual point of view, an American citizen. As such he was not in any way subject to the immigration laws. He was free to cross our borders without restraint and without regard to any of the documentary requirements of the Immigration Act of 1924. * * *
>
> "The theory of the Service . . . can be supported only through the use of the doctrine of relation back, a legal fiction at best. We do not think this legal fiction must be universally applied in every situation regardless of the particular circumstances involved. For example, we hardly think that a man in respondent's position who exercised his rights of citizenship prior to the cancellation of his certificate of naturalization could be punished for so acting even though, through the operation of the doctrine of relation back, he was an alien at the time he exercised those rights and even though his acts might be said to have been illegal. To us it seems unfair to seize upon a fiction to require respondent to have done that which was impossible of performance, namely, to present an immigration document at the time of his 1931 entry. 'Respect for law does not thrive

> on captious interpretations.' *Delgadillo* v. *Carmichael*, [332 U.S. 338]. To construe the 1924 act to require the impossible strikes us as a captious interpretation, an interpretation that we do not think Congress could have intended." [23]

To the demonstration that the Sixth and Ninth Circuits, in *Brancato* and *Mangaoang*, respectively, have rejected the application of the relation-back concept to a deportation statute, respondent reacts by executing an administrative gerrymander of the denaturalization statute. It confines *Brancato* and *Mangaoang* to their own facts and then approves the conclusion of its Special Inquiry Officer that

> ". . . denaturalization is retroactive and confers upon the subject the status of an alien at all times and for all purposes, except that one who entered while naturalized may not be considered as having entered as an alien, and except that certain language providing for the deportation of an alien who is a member of a proscribed organization requires that there must be a co-existence of alienage and membership." (R. 87-88).

Presumably if another circuit joins the Sixth and the Ninth in holding the relation-back concept inapplicable to deportation, respondent will simply add another "except" to its conclusion. Such *ad hoc* administrative accommodations can serve only to add confusion to a branch of the law not noted for its clarity.

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[23] Subsequently, the Board limited *Matter of C———* to deportation orders based on documentary charges, under the misapprehension that such a limitation was required by this Court in *Eichenlaub*. See *Matter of P———*, 4 I. & N. Dec. at 375. But *Eichenlaub* compelled no such limitation, since it avoided any approval of the relation-back doctrine. See *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d at 666.

It would seem that nothing short of a dispositive holding of this Court will prevail upon the immigration authorities to accept the fact that Congress, in providing for *ab initio* invalidity of improperly procured naturalization, intended to affect no more than claims to derivative citizenship.

## CONCLUSION

We submit that we have shown in Point I of our argument (1) that § 241 (a)(4) excludes petitioner from the class of deportables, since it applies only to persons who were aliens at the time they were convicted; and (2) that such ambiguity on this question as may be said to exist in § 241 (a)(4) must be resolved against deportability.

We submit, further, that we have shown in Point II of our argument (1) that the relation-back feature of the denaturalization statute may not be read into § 241 (a)(4) to make petitioner, for deportation purposes, an alien at the time he was convicted; and (2) that, even if the relation-back of denaturalization were imported into § 241 (a)(4), it could do no more than introduce an ambiguity which would, in any case, have to be resolved against deportability.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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